

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:) Chapter 11
)
W. R. GRACE & CO., et al.,¹) Case No. 01-001139 (JKF)
) (Jointly Administered)
)
Debtors.) Re: Docket No. 2189
) Hearing; July 22, 2002 10:00 a.m.

**DEBTORS' OBJECTIONS TO THE PROPERTY DAMAGE COMMITTEE'S MOTION
TO RETAIN SPECIAL COUNSEL FOR THE ZAI SCIENCE TRIAL**

Debtors object to the Property Damage Committee's Motion to Retain Special Counsel for the purposes of representing ZAI claimants ("Claimants") in the ZAI "science trial." In moving to have six different law firms represent Claimants and proposing a budget of over \$4.2 million, the PD Committee has violated both the letter and spirit of the Court's view of appointment of special counsel. The Court indicated that one lead counsel would be appointed for the science trial, and no more:

MR. BERNICK: If – I hate to say this, but if the experience in the fraudulent conveyance side is any indication, it may be difficult to reach agreement on a

¹ The Debtors consist of the following 62 entities: W. R. Grace & Co. (f/k/a Grace Specialty Chemicals, Inc.), W. R. Grace & Co.-Conn., A-1 Bit & Tool Co., Inc., Alewife Boston Ltd., Alewife Land Corporation, Amicon, Inc., CB Biomedical, Inc. (f/k/a Circe Biomedical, Inc.), CCHP, Inc., Coalgrace, Inc., Coalgrace II, Inc., Creative Food & Fun Company, Darex Puerto Rico, Inc., Del Taco Restaurants, Inc., Dewey and Almy, LLC (f/k/a Dewey and Almy Company), Ecarg, Inc., Five Alewife Boston Ltd., G C Limited Partners I, Inc. (f/k/a Grace Cocoa Limited Partners I, Inc.), G C Management, Inc. (f/k/a Grace Cocoa Management, Inc.), GEC Management Corporation, GN Holdings, Inc., GPC Thomasville Corp., Gloucester New Communities Company, Inc., Grace A-B Inc., Grace A-B II Inc., Grace Chemical Company of Cuba, Grace Culinary Systems, Inc., Grace Drilling Company, Grace Energy Corporation, Grace Environmental, Inc., Grace Europe, Inc., Grace H-G Inc., Grace H-G II Inc., Grace Hotel Services Corporation, Grace International Holdings, Inc. (f/k/a Dearborn International Holdings, Inc.), Grace Offshore Company, Grace PAR Corporation, Grace Petroleum Libya Incorporated, Grace Tarpon Investors, Inc., Grace Ventures Corp., Grace Washington, Inc., W. R. Grace Capital Corporation, W. R. Grace Land Corporation, Gracoal, Inc., Gracoal II, Inc., Guanica-Caribe Land Development Corporation, Hanover Square Corporation, Homco International, Inc., Kootenai Development Company, L B Realty, Inc., Litigation Management, Inc. (f/k/a GHSC Holding, Inc., Grace JVH, Inc., Asbestos Management, Inc.), Monolith Enterprises, Incorporated, Monroe Street, Inc., MRA Holdings Corp. (f/k/a Nestor-BNA Holdings Corporation), MRA Intermedco, Inc. (f/k/a Nestor-BNA, Inc.), MRA Staffing Systems, Inc. (f/k/a British Nursing Association, Inc.), Remedium Group, Inc. (f/k/a Environmental Liability Management, Inc., E&C Liquidating Corp., Emerson & Cuming, Inc.), Southern Oil, Resin & Fiberglass, Inc., Water Street Corporation, Axial Basin Ranch Company, CC Partners (f/k/a Cross Country Staffing), Hayden-Gulch West Coal Company, H-G Coal Company.

budget. And here's the big problem, is that everybody wants to be lead counsel and have a budget that reflects that they're lead counsel.

We had three different law firms all saying that they're lead counsel on different issues in the fraudulent conveyance litigation and as a result the budget is horrific.

THE COURT: Well let me make it easy. There's going to be one lead counsel, it's on a science trial, it's for a limited purpose. It's to do nothing else, so there will be one firm...

Then if any local counsel under whatever that local rule is, then I guess – no, they won't because they can use committee counsel as legal counsel.

MR. BERNICK: Right.

THE COURT: So one attorney, one lead counsel.

(May 20, 2002 transcript at pp. 105-106).

Likewise, as reflected in the \$4.2 million budget² submitted by the PD Committee, the scope of the science trial contemplated by the PD Committee goes well beyond what the Court viewed as “pretty much cut and dried battle of experts on the liability.” (April 22, 2002 transcript at p. 30). Further, the PD Committee has proposed the retention of five law firms, to be paid in full by the Debtors at hourly rates, where heretofore the law firms represented Claimants on a contingent fee basis. The Debtors suggest a modified contingent fee arrangement is more appropriate, reasonable and in keeping with the Court's directions.

The Claimants Do Not Need Six Law Firms Participating In The Science Trial

The PD Committee has moved to employ five law firms to represent Claimants in the science trial. The PD Committee has also suggested that its own counsel act as “gatekeeper” for the litigation. This suggestion is contrary to the Court's ruling at the May 20, 2002 hearing and unnecessary. As the Court stated, retention of special counsel is for the “limited purpose” of

² Pursuant to the Court's Order of June 18, 2002, the Debtors' objections to the PD Committee's proposed budget for special counsel, are due to be filed with the Court on July 8, 2002.

representing Claimants in the science trial. (May 20, 2002 transcript at p. 106). While the Court has not specifically defined the issues to be tried, it has indicated that the science trial is being set for a limited purpose:

“There just -- it doesn’t make logical sense not to do the science trial first in some fashion. It needs to be done, both to find out whether there really is potential liability for the estate. And if there is that liability, to define how the notices should be created and go forward.” (May 20, 2002 transcript at p. 68).

“...whether there is some science basis for liability.” (May 20, 2002 transcript at p. 69)

“That’s the only issue I’m going to take up, until we get the liability on the hazardous nature of this product determined.” (May 20, 2002 transcript at p. 94)

It is unnecessary for the Court to approve, and the Debtors to pay, six law firms to participate in the science trial. Again, the Court made this clear:

“Each of these individual claimants obviously has the right to their own counsel. And if they want to bring their own counsel involved in this case, there’s certainly nothing that this Court would do to prohibit it.

MR. BERNICK: Would we have to pay for it, though?

THE COURT: No, not for their individual counsel. But for committee counsel for them the [sic] pick up in this case and represent it, yes.”

(May 20, 2002 transcript at p. 69).

Since the PD Committee disregarded the Court’s directions regarding the retention of one law firm to act as special counsel in the trial, the Court must decide which of the many firms proffered by the Committee should be permitted to act as special counsel.

The Debtors recognize that Mr. Westbrook of Richardson, Patrick, Westbrook, Brickman and Mr. Turkewitz of Ness, Motley, Loadholt, Richardson & Poole used to be with the same law firm and have worked together on property damage cases against the Debtors. Moreover, Messrs. Westbrook and Turkewitz actively participated in the Barbanti case and the MDL proceeding. Thus, the Debtors can accept those individuals and their respective firms

working together on the science trial. In fact, they are the logical choice to act as special counsel in the science trial. That being the case however, there does not appear to be any role for Lukins & Annis, a Spokane firm that primarily dealt with Washington State facts relating to specific named plaintiffs in Barbanti. All of the factual information and knowledge needed to present scientific evidence concerning ZAI will already be present with Messrs. Westbrook and Turkewitz. There is, thus, no need or justification for retaining Lukins & Annis unless one or more of the Claimants wants to hire and pay for that firm as additional counsel themselves.

Likewise, there is no need for the PD Committee to employ McGarvey, Heberling, Sullivan & McGarvey PC. The McGarvey firm is a Montana law firm that has a history of pursuing mostly personal injury actions against the Debtors in the state of Montana relating to the Debtors' Libby, Montana mining operations. The McGarvey firm has no special expertise with respect to property damage litigation against the Debtors and no particular expertise with respect to ZAI. Any experience that the McGarvey firm has with respect to litigation with the Debtors is also held by Messrs. Westbrook and Turkewitz.

Retention of Lieff Cabraser, Heilmann & Bernstein LLP is completely unnecessary. Lieff Cabraser has no particular expertise in asbestos or the Debtors' businesses or products. Lieff Cabraser is a firm specializing in class action tort cases. Lieff Cabraser's role in the Barbanti matter, the only ZAI matter to have generated any evidentiary hearings (on a request for a preliminary injunction) was extremely limited. Lieff Cabraser's participation in Barbanti was limited to class certification issues. They were not active in the preliminary injunction hearing which addressed the "science issue" of whether ZAI posed an imminent health hazard that required immediate injunctive relief.

The Court has made it clear that all matters related to class certification and class proofs of claim will be deferred until after the science trial:

“I’m trying to make this clear. I want to avoid having to worry about the class certifications until I find out whether there is a reason to certify a class. The way to do that is to look at the science issue. I want to get the science issue tried at the trial. If the debtor loses that trial, then the next thing I’m doing will be a class certification issue.

If the debtor wins, then I’m going to look at the class certification issues anyway, but probably with a different view than I might have otherwise. So the class certification issues will be then, they’re not permanently delayed, they’re simply being put on hold until I get the liability issues determined.”

(May 20, 2002 transcript at pp. 108-109) Thus, the participation of Leiff Cabraser is completely unnecessary and the PD Committee’s application to employ them must be denied.

Finally, having PD Committee counsel act as “gatekeeper” in the science trial is completely unnecessary (especially if special counsel is limited to two firms). Claimants will be more than adequately represented by Messrs. Westbrook and Turkewitz and no gatekeeping function is necessary. Since Committee counsel has conceded that it would be inappropriate for it to represent Claimants in the science trial, Committee counsel’s participation should be limited to keeping up to date on the status of the science trial on behalf of its constituents, much like the Debtors expect the Official Committee of Unsecured Creditors and the Asbestos Personal Injury Committee will do, and no more.

Compensation for Claimants’ Counsel on an Hourly Rate Basis is Inappropriate

A debtors’ estate is not generally required to bear the costs of claimants prosecuting claims *against* the estate. The fee arrangements approved by District Judge Wolin for the Committee’s special counsel to prosecute the Fraudulent Conveyance matter is not relevant. There, special counsel is representing the Debtors’ estates. In this situation, the Court has made the extraordinary suggestion that for the science trial to proceed, the Debtors’ estates are going to

have to defray some of special counsel's costs. While the Debtors are not in the business of compensating Claimants for prosecuting claims against them, the Court has suggested that the science trial is essential in order to find out whether there really is a potential ZAI liability.

The Committee proposes that special counsel be retained to represent Claimants in the science trial on a full hourly rate basis. The Debtors find this suggestion unusual since all of these firms are essentially mass tort plaintiff's firms who have contingent fee arrangements with Claimants. The Court has suggested that for the ZAI science trial to proceed, the Debtors have no choice but to bear the "out of pocket costs" of the trial. (May 20, 2002 transcript at p. 76) However, the Court did not suggest that the Debtors' estates would have to bear the costs of a full hourly fee arrangement for special counsel:

"I think class actions typically do these things on a contingent basis, because there is an upside. If you win, you get the lion's share of whatever the share of the attorney proceeds would be, you have the opportunity to come before the court to assess those fees, and so typically they are contingent.

I think by requiring the debtor to pick up the costs of expenses, that's going a long way."

(May 20, 2002 transcript at p. 81).

Taking to heart the Court's direction, on June 7, 2002, the Debtors filed their Suggestion of a Proposed Budget for Prosecution of ZAI Claimants' Case in the Science Trial. In that pleading, the Debtors suggested a compromise between paying full hourly rates and a traditional contingent fee arrangement for special counsel. Pursuant to this compromise, the Debtors would assure that all of special counsel's true costs are covered by reimbursing reasonable out of pocket disbursements plus providing special counsel with a reduced hourly rate and the opportunity to earn a higher rate and a premium if the Claimants are successful in the science trial.

A debtors' estate is not generally assessed the costs of claimants for prosecuting claims against the estate. In this extraordinary situation, the Court has said that the science trial is vital

to the estates and the Debtors will have to defray some of the Claimants' costs. The type of compensation arrangement proposed by the Debtors represents a reasonable compromise. It is designed to assure that special counsel's true costs are covered yet does not require that the Debtors reward Claimants for prosecuting claims against the Debtors' estates which may be without merit.

Conclusion

The PD Committee's Motion to Employ Special Counsel should be granted only insofar as the PD Committee be permitted to employ the firms of Richardson, Patrick, Westbrook, Brickman and Ness, Motley, Loadhold, Richardson & Poole as special counsel in the ZAI science trial, under the fee arrangement proposed by the Debtors herein. The remaining portion of the Motion should be denied.

July 1, 2002

Respectfully submitted,

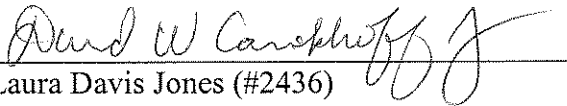
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